LIM KWEE FAH

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 44-19-91]
10 JUNE 1991

CRIMINAL PROCEDURE: *Initial detention order - Revoked - Fresh detention order - Review by Advisory Board - Mandatory provision - Not earlier than 12 months from date of such order - Not later than 3 months before expiration of period of detention - Lex non cogit ad impossibilia - Failure of Minister to direct Advisory Board to review the case - Effect of - Statute to be rigidly and meticulously complied with - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 7, 11A(1)(aa), 11B, 11(1).*

By an order dated 14 May 1988, the applicant was detained for a period of 2 years pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act).

On 18 February 1990 the applicant applied for a writ of *habeas corpus*; however, before it could be heard, the Deputy Minister of Home Affairs pursuant to s. 11B of the Act revoked the detention order on 3 April 1990 and contemporaneously issued another fresh detention order dated 3 April 1990 detaining the applicant for 1 year and expressed to expire on 2 April 1991.

By an order dated 1 April 1991, the applicant's detention was extended by the Deputy Minister under s. 11A(1)(a) of Act for one year commencing immediately upon the date of its expiry.

On 5 December 1990, the Advisory Board had reviewed the order dated 3 April 1990 and had submitted its report to the Minister for Home Affairs.

In his application for *habeas corpus*, the applicant contended that this review was premature and in breach of the mandatory provisions of s. 11(1) of the Act which provided that the order was to be reviewed not earlier than 12 months from the date of the order or direction and not later than 3 months before the expiration of the period of detention specified therein.

Held:
[1] Having regard to the time table of the relevant events, it would have been impossible for the detaining authority to have complied with the requirements of s. 11(1) of the Act and the maxim *lex non cogit ad impossibilia* (the law does not compel the impossible) would have defeated the applicant's application.
[2] However s. 11(1) of the Act empowers the Minister (including the Deputy Minister) at any time during the period of the detention or restriction imposed by the detention order or the direction, to direct the Advisory Board to review the case concerned. In this case the Deputy Minister did not invoke his powers under this proviso. As this provision had not been strictly complied with,, the relevant order should be set aside.

[Application for habeas corpus granted.]

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), (3), 7, 9, 11A(1)(aa), 11A, 11B

For the applicant - V. Shanmugam; M/s. Shanmugam & Co.
For the respondents - Noorbahri bin Baharuddin, Federal Counsel

JUDGMENT

Edgar Joseph Jr J:

The applicant had been detained at the Pusat Pemulihan Akhlak, Pulau Jerejak, Penang, by virtue of a detention order dated 14 May 1988, issued pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures Act 1985, (the Act)) expressed to authorise his detention for a period of two years with effect from 26 May 1988 on the ground, broadly stated, that he had been involved in activities relating to the trafficking of dangerous drugs.

On 18 February 1990, he had filed an application for a writ of *habeas corpus* in the High Court at Muar. However, before his application could be heard and determined, the Deputy Minister for Home Affairs had by an order dated 3 April 1990 made pursuant to the powers conferred upon him by s. 11B of the Act revoked the detention order but had contemporaneously issued another detention order also dated 3 April 1990 (the fresh detention order) purportedly authorising the detention of the applicant for one year with effect from the date thereof.

Then, by an order dated 1 April 1991, the Deputy Minister had pursuant to the powers conferred upon him by s. 11A(1) (aa) directed that the duration of the fresh detention order be extended for a further period of one year commencing immediately upon the date of its expiry.

Going back a little, to matters directly relevant to the issue arising on this application, although the fresh detention order was expressed to expire on 2 April 1991, the advisory board reviewed the same on 5 December 1990 and forthwith submitted its report to the Minister for Home Affairs. This the applicant says was premature regard being had to the provisions of s. 11(1) which are as follows:

> Every order or direction made or given by the Minister under the subs. (1) or (3) of s. 6 or under s. 7, or under subs. (1) of s. 11A, shall, so long as it remains in force and whether or not representations under s. 9 have been made, be reviewed by an advisory board not earlier than twelve months from date of such order or direction and in any case not later than three months before the expiration of the period mentioned in such order or direction.
>
> Provided that the Minister may, at any time during the period of detention or restriction imposed by such order or direction, direct the advisory board to review the case.

In consequence, said Counsel, there had been a breach of a mandatory provision of the Act, and so the continued detention of the applicant was unlawful.

On the other hand, the Federal Counsel for the respondent, contended that as the fresh detention order was expressed to expire one year from that date, that is to say, on 2 April 1991, it was impossible for the advisory board to have reviewed it "not earlier than 12 months from the date" it bore.

My attention was also directed to the concluding words of s. 11(1) of the Act which read as follows:

> and in case not later than three months before the expiration of the period mentioned in such order or direction

- a requirement which it was said, had been complied with.

It is obvious from the reading of s. 11(1) that there are two time barriers which must be surmounted by the Detaining Authority; first, the detention order or the direction, as the case may be, "shall" be reviewed by the advisory board not **earlier** than twelve months from the date of such order or direction **and** secondly, such review shall be conducted **not later** than three months before the expiration of the period of detention specified therein.

I agree that having regard to the time table of the relevant events hereinbefore mentioned it would have been impossible for the Detaining Authority to have complied with the requirements of s. 11(1) and, if matters rested there, I fail to see how the applicant could succeed on the ground advanced on his behalf for it is well known maxim than *lex non cogit ad impossibilia* (the law does not compel the impossible).

But, matters do not rest there, because the provisions of the proviso clearly empower the Minister for Home Affairs, and this of course includes the Deputy Minister, **at any time during the period of the detention or restriction** imposed by the detention order or the direction, to direct the advisory board to review the case concerned. It is common ground that in the present case the Deputy Minister did not invoke his powers under the provisions of the proviso.

It is a familiar proposition, too well known to need citation of authority, that in cases of preventive detention, the provisions of the statute authorising such detention must be rigidly and meticulously complied with failing which the relevant order is liable to be set aside and the subject set free.

The result therefore is that this application for *habeas corpus* is granted and I direct that the applicant be set at liberty forthwith.

Also found at [1991] 3 CLJ 1815